

Todd M. Friedman (SBN 216752)
 Adrian R. Bacon (SBN 280332)
 Meghan E. George (SBN 274525)
 Tom E. Wheeler (SBN 308789)
 LAW OFFICES OF TODD M. FRIEDMAN, P.C.
 21550 Oxnard St., Suite 780
 Woodland Hills, CA 91367
 Phone: 323-306-4234
 Fax: 866-633-0228
 tfriedman@ toddflaw.com
 abacon@ toddflaw.com
 mgeorge@toddfllaw.com
 twheeler@toddfllaw.com
Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

SIDNEY NAIMAN, individually and) Case No.
 on behalf of all others similarly situated,)

Plaintiff,

vs.

NATIONAL BANKCARD)
 CORPORATION, and DOES 1 through)
 10, inclusive, and each of them,)
 Defendant.)

CLASS ACTION

**COMPLAINT FOR VIOLATIONS
 OF:**

1. NEGLIGENT VIOLATIONS
 OF THE TELEPHONE
 CONSUMER PROTECTION
 ACT [47 U.S.C. §227(b)]
2. WILLFUL VIOLATIONS
 OF THE TELEPHONE
 CONSUMER PROTECTION
 ACT [47 U.S.C. §227(b)]
3. NEGLIGENT VIOLATIONS
 OF THE TELEPHONE
 CONSUMER PROTECTION
 ACT [47 U.S.C. §227(c)]
4. WILLFUL VIOLATIONS
 OF THE TELEPHONE
 CONSUMER PROTECTION
 ACT [47 U.S.C. §227(c)]

DEMAND FOR JURY TRIAL

1 Plaintiff SIDNEY NAIMAN (“Plaintiff”), individually and on behalf of all
2 others similarly situated, alleges the following upon information and belief based
3 upon personal knowledge:

4 **NATURE OF THE CASE**

5 1. Plaintiff brings this action individually and on behalf of all others
6 similarly situated seeking damages and any other available legal or equitable
7 remedies resulting from the illegal actions of NATIONAL BANKCARD
8 CORPORATION (“Defendant”), in negligently, knowingly, and/or willfully
9 contacting Plaintiff on Plaintiff’s cellular telephone in violation of the Telephone
10 Consumer Protection Act, *47 U.S.C. § 227 et seq.* (“TCPA”) and related
11 regulations, specifically the National Do-Not-Call provisions, thereby invading
12 Plaintiff’s privacy.

13 **JURISDICTION & VENUE**

14 2. Jurisdiction is proper under *28 U.S.C. § 1332(d)(2)* because Plaintiff,
15 a resident of California, seeks relief on behalf of a Class, which will result in at
16 least one class member belonging to a different state than that of Defendant, an
17 Illinois company. Plaintiff also seeks up to \$1,500.00 in damages for each call in
18 violation of the TCPA, which, when aggregated among a proposed class in the
19 thousands, exceeds the \$5,000,000.00 threshold for federal court jurisdiction.
20 Therefore, both diversity jurisdiction and the damages threshold under the Class
21 Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

22 3. Venue is proper in the United States District Court for the Northern
23 District of California pursuant to *28 U.S.C. § 1391(b)* and because Defendant does
24 business within the State of California and Plaintiff resides within the County of
25 Contra Costa.

26 **PARTIES**

27 4. Plaintiff, SIDNEY NAIMAN (“Plaintiff”), is a natural person residing
28 in Contra Costa County, California and is a “person” as defined by *47 U.S.C. § 153*

1 (39).

2 5. Defendant, NATIONAL BANKCARD CORPORATION
3 (“Defendant”) is a credit card processing company, and is a “person” as defined by
4 47 U.S.C. § 153 (39).

5 6. The above named Defendant, and its subsidiaries and agents, are
6 collectively referred to as “Defendants.” The true names and capacities of the
7 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are
8 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
9 names. Each of the Defendants designated herein as a DOE is legally responsible
10 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
11 Complaint to reflect the true names and capacities of the DOE Defendants when
12 such identities become known.

13 7. Plaintiff is informed and believes that at all relevant times, each and
14 every Defendant was acting as an agent and/or employee of each of the other
15 Defendants and was acting within the course and scope of said agency and/or
16 employment with the full knowledge and consent of each of the other Defendants.
17 Plaintiff is informed and believes that each of the acts and/or omissions complained
18 of herein was made known to, and ratified by, each of the other Defendants.

19 **FACTUAL ALLEGATIONS**

20 8. Beginning in or around June 2017, and continuing through July 2017,
21 Defendant contacted Plaintiff on Plaintiff’s cellular telephone number ending in -
22 5502, in an attempt to solicit Plaintiff to purchase Defendant’s services.

23 9. Defendant used an “automatic telephone dialing system” as defined
24 by 47 U.S.C. § 227(a)(1) to place its call to Plaintiff seeking to solicit its services.

25 10. Defendant contacted or attempted to contact Plaintiff from telephone
26 numbers belonging to Defendant, including without limitation (312) 836-0507,
27 (312) 222-0131, and (312) 856-0544.

28 11. Defendant’s calls constituted calls that were not for emergency

1 purposes as defined by 47 U.S.C. § 227(b)(1)(A).

2 12. Defendant's calls were placed to telephone number assigned to a
3 cellular telephone service for which Plaintiff incurs a charge for incoming calls
4 pursuant to 47 U.S.C. § 227(b)(1).

5 13. During all relevant times, Defendant did not possess Plaintiff's "prior
6 express consent" to receive calls using an automatic telephone dialing system or an
7 artificial or prerecorded voice on his cellular telephone pursuant to 47 U.S.C. §
8 227(b)(1)(A).

9 14. Further, Plaintiff's cellular telephone number ending in -5502 was
10 added to the National Do-Not-Call Registry on or about July 27, 2003, well over
11 thirty (30) days prior to Defendant's initial call to Plaintiff.

12 15. Plaintiff also stated to one of Defendant's employees that he was not
13 interested in buying or using Defendant's products and did not want to be contacted
14 again.

15 16. Despite this, Defendant continued to contact Plaintiff.

16 17. Defendant placed multiple calls soliciting its business to Plaintiff on
17 his cellular telephone beginning on or about June of 2017 and continuing until on
18 or about July of 2017.

19 18. Such calls constitute solicitation calls pursuant to 47 C.F.R. §
20 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

21 19. Plaintiff received numerous solicitation calls from Defendant within a
22 12-month period.

23 20. Defendant continued to call Plaintiff in an attempt to solicit its
24 services and in violation of the National Do-Not-Call provisions of the TCPA.

25 21. Upon information and belief, and based on Plaintiff's experiences of
26 being called by Defendant after being on the National Do-Not-Call list for several
27 years prior to Defendant's initial call, and at all relevant times, Defendant failed to
28 establish and implement reasonable practices and procedures to effectively prevent

1 telephone solicitations in violation of the regulations prescribed under 47 U.S.C. §
2 227(c)(5).

3 **CLASS ALLEGATIONS**

4 22. Plaintiff brings this action individually and on behalf of all others
5 similarly situated, as a member the three proposed classes (hereafter, jointly, “The
6 Classes”).

7 23. The class concerning the ATDS claim for no prior express consent
8 (hereafter “The ATDS Class”) is defined as follows:

9 All persons within the United States who received any
10 solicitation/telemarketing telephone calls from
11 Defendant to said person’s cellular telephone made
12 through the use of any automatic telephone dialing
13 system or an artificial or prerecorded voice and such
14 person had not previously consented to receiving such
15 calls within the four years prior to the filing of this
16 Complaint

16 24. The class concerning the ATDS claim for revocation of consent, to the
17 extent prior consent existed (hereafter “The ATDS Revocation Class”) is defined
18 as follows:

19 All persons within the United States who received any
20 solicitation/telemarketing telephone calls from
21 Defendant to said person’s cellular telephone made
22 through the use of any automatic telephone dialing
23 system or an artificial or prerecorded voice and such
24 person had revoked any prior consent to receive such
25 calls prior to the calls within the four years prior to the
26 filing of this Complaint

25 25. The class concerning the National Do-Not-Call violation (hereafter
26 “The DNC Class”) is defined as follows:
27

28 All persons within the United States registered on the

1 National Do-Not-Call Registry for at least 30 days, who
2 had not granted Defendant prior express consent nor had
3 a prior established business relationship, who received
4 more than one call made by or on behalf of Defendant
5 that promoted Defendant's products or services, within
6 any twelve-month period, within four years prior to the
7 filing of the complaint.

8 26. Plaintiff represents, and is a member of, The ATDS Class, consisting
9 of all persons within the United States who received any solicitation telephone calls
10 from Defendant to said person's cellular telephone made through the use of any
11 automatic telephone dialing system or an artificial or prerecorded voice and such
12 person had not previously not provided their cellular telephone number to
13 Defendant within the four years prior to the filing of this Complaint.

14 27. Plaintiff represents, and is a member of, The ATDS Revocation Class,
15 consisting of all persons within the United States who received any
16 solicitation/telemarketing calls from Defendant to paid person's cellular telephone
17 made through the use of any automatic telephone dialing system or an artificial or
18 prerecorded voice and such person had revoked any prior express consent to receive
19 such calls prior to the calls within the four years prior to the filing of this Complaint.

20 28. Plaintiff represents, and is a member of, The DNC Class, consisting
21 of all persons within the United States registered on the National Do-Not-Call
22 Registry for at least 30 days, who had not granted Defendant prior express consent
23 nor had a prior established business relationship, who received more than one call
24 made by or on behalf of Defendant that promoted Defendant's products or services,
25 within any twelve-month period, within four years prior to the filing of the
26 complaint.

27 29. Defendant, its employees and agents are excluded from The Classes.
28 Plaintiff does not know the number of members in The Classes, but believes the
Classes members number in the thousands, if not more. Thus, this matter should

1 be certified as a Class Action to assist in the expeditious litigation of the matter.

2 30. The Classes are so numerous that the individual joinder of all of its
3 members is impractical. While the exact number and identities of The Classes
4 members are unknown to Plaintiff at this time and can only be ascertained through
5 appropriate discovery, Plaintiff is informed and believes and thereon alleges that
6 The Classes includes thousands of members. Plaintiff alleges that The Classes
7 members may be ascertained by the records maintained by Defendant.

8 31. Plaintiff and members of The ATDS Class were harmed by the acts of
9 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
10 and ATDS Class members via their cellular telephones thereby causing Plaintiff
11 and ATDS Class and ATDS Revocation Class members to incur certain charges or
12 reduced telephone time for which Plaintiff and ATDS Class and ATDS Revocation
13 Class members had previously paid by having to retrieve or administer messages
14 left by Defendant during those illegal calls, and invading the privacy of said
15 Plaintiff and ATDS Class and ATDS Revocation Class members.

16 32. Common questions of fact and law exist as to all members of The
17 ATDS Class which predominate over any questions affecting only individual
18 members of The ATDS Class. These common legal and factual questions, which
19 do not vary between ATDS Class members, and which may be determined without
20 reference to the individual circumstances of any ATDS Class members, include,
21 but are not limited to, the following:

- 22 a. Whether, within the four years prior to the filing of this
23 Complaint, Defendant made any telemarketing/solicitation call
24 (other than a call made for emergency purposes or made with
25 the prior express consent of the called party) to a ATDS Class
26 member using any automatic telephone dialing system or any
27 artificial or prerecorded voice to any telephone number
28 assigned to a cellular telephone service;

- b. Whether Plaintiff and the ATDS Class members were damaged thereby, and the extent of damages for such violation; and
- c. Whether Defendant should be enjoined from engaging in such conduct in the future.

33. As a person that received numerous telemarketing/solicitation calls from Defendant using an automatic telephone dialing system or an artificial or prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of The ATDS Class.

34. Common questions of fact and law exist as to all members of The ATDS Revocation Class which predominate over any questions affecting only individual members of The ATDS Revocation Class. These common legal and factual questions, which do not vary between ATDS Revocation Class members, and which may be determined without reference to the individual circumstances of any ATDS Revocation Class members, include, but are not limited to, the following:

- a. Whether, within the four years prior to the filing of this Complaint, Defendant made any telemarketing/solicitation call (other than a call made for emergency purposes or made with the prior express consent of the called party) to an ATDS Revocation Class member, who had revoked any prior express consent to be called using an ATDS, using any automatic telephone dialing system or any artificial or prerecorded voice to any telephone number assigned to a cellular telephone service;
- b. Whether Plaintiff and the ATDS Revocation Class members were damaged thereby, and the extent of damages for such violation; and
- c. Whether Defendant and their agents should be enjoined from

engaging in such conduct in the future.

35. As a person that received numerous telemarketing/solicitation calls from Defendant using an automatic telephone dialing system or an artificial or prerecorded voice, after Plaintiff had revoked any prior express consent, Plaintiff is asserting claims that are typical of The ATDS Revocation Class.

36. Plaintiff and members of The DNC Class were harmed by the acts of Defendant in at least the following ways: Defendant illegally contacted Plaintiff and DNC Class members via their telephones for solicitation purposes, thereby invading the privacy of said Plaintiff and the DNC Class members whose telephone numbers were on the National Do-Not-Call Registry. Plaintiff and the DNC Class members were damaged thereby.

37. Common questions of fact and law exist as to all members of The DNC Class which predominate over any questions affecting only individual members of The DNC Class. These common legal and factual questions, which do not vary between DNC Class members, and which may be determined without reference to the individual circumstances of any DNC Class members, include, but are not limited to, the following:

- a. Whether, within the four years prior to the filing of this Complaint, Defendant or its agents placed more than one solicitation call to the members of the DNC Class whose telephone numbers were on the National Do-Not-Call Registry and who had not granted prior express consent to Defendant and did not have an established business relationship with Defendant;
- b. Whether Defendant obtained prior express written consent to place solicitation calls to Plaintiff or the DNC Class members' telephones;
- c. Whether Plaintiff and the DNC Class member were damaged

thereby, and the extent of damages for such violation; and

d. Whether Defendant and its agents should be enjoined from engaging in such conduct in the future.

38. As a person that received numerous solicitation calls from Defendant within a 12-month period, who had not granted Defendant prior express consent and did not have an established business relationship with Defendant, Plaintiff is asserting claims that are typical of the DNC Class.

39. Plaintiff will fairly and adequately protect the interests of the members of The Classes. Plaintiff has retained attorneys experienced in the prosecution of class actions.

40. A class action is superior to other available methods of fair and efficient adjudication of this controversy, since individual litigation of the claims of all Classes members is impracticable. Even if every Classes member could afford individual litigation, the court system could not. It would be unduly burdensome to the courts in which individual litigation of numerous issues would proceed. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same complex factual issues. By contrast, the conduct of this action as a class action presents fewer management difficulties, conserves the resources of the parties and of the court system, and protects the rights of each Classes member.

41. The prosecution of separate actions by individual Classes members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of the other Classes members not parties to such adjudications or that would substantially impair or impede the ability of such non-party Class members to protect their interests.

42. Defendant has acted or refused to act in respects generally applicable to The Classes, thereby making appropriate final and injunctive relief with regard

1 to the members of the Classes as a whole.

2 **FIRST CAUSE OF ACTION**

3 **Negligent Violations of the Telephone Consumer Protection Act**

4 **47 U.S.C. §227(b).**

5 **On Behalf of the ATDS Class and ATDS Revocation Class**

6 43. Plaintiff repeats and incorporates by reference into this cause of action
7 the allegations set forth above at Paragraphs 1-42.

8 44. The foregoing acts and omissions of Defendant constitute numerous
9 and multiple negligent violations of the TCPA, including but not limited to each
10 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular
11 *47 U.S.C. § 227 (b)(1)(A)*.

12 45. As a result of Defendant's negligent violations of *47 U.S.C. § 227(b)*,
13 Plaintiff and the Class Members are entitled an award of \$500.00 in statutory
14 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

15 46. Plaintiff and the ATDS Class and the ATDS Revocation Class
16 members are also entitled to and seek injunctive relief prohibiting such conduct in
17 the future.

18 **SECOND CAUSE OF ACTION**

19 **Knowing and/or Willful Violations of the Telephone Consumer Protection**
20 **Act**

21 **47 U.S.C. §227(b)**

22 **On Behalf of the ATDS Class and the ATDS Revocation Class**

23 47. Plaintiff repeats and incorporates by reference into this cause of action
24 the allegations set forth above at Paragraphs 1-42.

25 48. The foregoing acts and omissions of Defendant constitute numerous
26 and multiple knowing and/or willful violations of the TCPA, including but not
27 limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*,
28 and in particular *47 U.S.C. § 227 (b)(1)(A)*.

49. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and the ATDS Class and the ATDS Revocation Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

50. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

On Behalf of the DNC Class

51. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-42.

52. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227(c), and in particular 47 U.S.C. § 227 (c)(5).

53. As a result of Defendant's negligent violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class Members are entitled an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B).

54. Plaintiff and the DNC Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227 et seq.

On Behalf of the DNC Class

55. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-42.

56. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*, in particular *47 U.S.C. § 227 (c)(5)*.

57. As a result of Defendant's knowing and/or willful violations of *47 U.S.C. § 227(c)*, Plaintiff and the DNC Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(c)(5)*.

58. Plaintiff and the DNC Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment against Defendant for the following:

FIRST CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendant's negligent violations of *47 U.S.C. §227(b)(1)*, Plaintiff and the ATDS Class and ATDS Revocation members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to *47 U.S.C. 227(b)(3)(B)*.
- Any and all other relief that the Court deems just and proper.

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendant's willful and/or knowing violations of *47 U.S.C. §227(b)(1)*, Plaintiff and the ATDS Class and the ATDS Revocation Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation,

pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).

- Any and all other relief that the Court deems just and proper.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

- As a result of Defendant's negligent violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(c)(5).
- Any and all other relief that the Court deems just and proper.

FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(c)(5).
- Any and all other relief that the Court deems just and proper.

JURY TRIAL

59. Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Respectfully Submitted this 29th Day of October, 2018.

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: /s/ Todd M. Friedman
Todd M. Friedman
Law Offices of Todd M. Friedman
Attorney for Plaintiff